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MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant David T.J. Tuggle appeals his conviction for Battery,¹ a class D felony, stemming from cause number 03D01-0512-FD-2011 (FD-2011). Specifically, Tuggle argues that the trial court erroneously admitted evidence of a prior theft conviction and that the trial court erred by denying his motion to dismiss after he was not sentenced within thirty days of the conviction. Furthermore, based on the battery conviction, the trial court revoked Tuggle's probation in cause number 03D01-0502-FD-256 (FD-256). Tuggle argues that the trial court erred by revoking his probation because he had not actually been released to probation at the time he committed the subsequent offense. Finding no reversible error, we affirm the judgment of the trial court.

FACTS

FD-256

On May 24, 2005, Tuggle pleaded guilty to class D felony neglect of a dependent and class D felony resisting law enforcement. On June 7, 2005, the trial court sentenced him to serve two years imprisonment on each count, with the sentences to run consecutively, and suspended two years to probation.

FD-2011

Tuggle was serving his sentence for FD-256 at the Bartholomew County Jail on December 6, 2005. After refusing to comply with an officer's order for him to move to

¹ Ind. Code § 35-42-2-1.

another cell, Tuggle fought with the officer and caused him bodily injury. On December 7, 2005, the State charged Tuggle with class D felony battery resulting in bodily injury and alleged him to be a habitual offender. A jury found Tuggle guilty as charged on November 22, 2006.

Tuggle filed a motion to dismiss his battery conviction on June 5, 2007, arguing that the trial court had violated Indiana Criminal Procedure Rule 11 by failing to sentence him within thirty days of his conviction. The trial court denied Tuggle's motion on June 13, 2007, sentenced him to three years imprisonment, and enhanced the sentence by eighteen months for the habitual offender finding. Additionally, the trial court ordered the sentence to run consecutively to the sentence imposed in FD-256. Tuggle appeals the trial court's decision to allow the State to admit evidence of a previous conviction from 1995 and its denial of his motion to dismiss.

Probation Revocation

On December 13, 2005, the State filed a petition to revoke Tuggle's probation in FD-256, alleging that Tuggle had violated his probation by committing the battery offense. On June 13, 2007, the trial court entered an order granting the State's petition and revoking Tuggle's probation, ordering him to serve two years with the Department of Correction. Tuggle now appeals his probation revocation.

DISCUSSION AND DECISION

I. FD-2011 Direct Appeal

A. Evidence of Prior Conviction

Tuggle was convicted of class D felony theft on May 4, 1995. He was sentenced to 185 days imprisonment with 180 suspended and placed on probation. On August 24, 1998, Tuggle's probation for the offense was revoked. Prior to testifying at his battery trial, Tuggle filed a motion in limine, asking the trial court to suppress the State's evidence regarding his prior theft conviction because more than ten years had elapsed since that conviction. The State argued that the conviction occurred within "the time period for impeachable offenses" because Tuggle's probation for the offense ended less than ten years before the date on which the evidence was introduced. Tr. p. 205. Ultimately, the trial court denied Tuggle's motion and during cross-examination, the State asked Tuggle:

Q. And back on May 4, 1995, you were convicted in Marion County, Court Fifteen of theft, is that correct?

A. Yes ma'am.

Id. at 232.

Indiana Evidence Rule 609 provides that for the purpose of attacking the credibility of a witness,

evidence of conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or, if the conviction resulted in confinement of the witness then the date of the release of the witness from the confinement unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances

substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

The threshold question is whether Tuggle's prior conviction falls outside the ten-year time period provided by Evidence Rule 609(b). The parties agree that the ten-year window closed when Tuggle testified about the conviction on November 21, 2006. See Whiteside v. State, 853 N.E.2d 1021, 1028 (Ind. Ct. App. 2006) (holding that the date the witness testifies or the evidence is introduced is the most appropriate termination point for determining whether a conviction falls within the ten-year period provided by Evidence Rule 609). However, the parties disagree regarding the date on which the time period started: Tuggle argues that it started when he was convicted on May 4, 1995, and the State argues that he was still "confined" on probation when his probation was revoked on August 24, 1998.

Assuming for the sake of the argument that we agree with Tuggle and find that more than ten years had elapsed and the trial court erred when it allowed the State to question him about the theft conviction, the admission of impeachment evidence is harmless "when the conviction is supported by such substantial evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction." Wales v. State, 768 N.E.2d 513, 521 (Ind. Ct. App. 2002), clarified on reh'g by Wales v. State, 774 N.E.2d 116 (Ind. Ct. App. 2002).

To convict Tuggle of class D felony battery, the State had to prove beyond a reasonable doubt that he knowingly or intentionally touched a law enforcement officer engaged in the execution of his official duty in a rude, insolent, or angry manner, resulting in bodily injury. I.C. § 35-42-2-1. Eight officers testified at Tuggle's trial. Their testimony revealed that Tuggle disliked an officer's order that he move to another cell. After refusing to move, Sergeant David Boston and Corrections Officer Jared Mullins spoke to Tuggle, who continued to refuse their requests. Tr. p. 98, 116, 134. As a result of his noncompliance, Sergeant Boston ordered Tuggle to place his hands behind his back. Id. at 140-42. Tuggle refused and Sergeant Boston informed him that he would have to spray him with pepper spray if he refused to comply. Id. at 97-98, 140-42. When Sergeant Boston reached for the pepper spray can, Tuggle slapped his hand, knocking the can to the ground. Id. at 119. Tuggle then hit Sergeant Boston in the face and on the left side of the head with his right hand. Id. at 142. When Sergeant Boston fell to the ground, Tuggle sprayed him with the pepper spray. Id. at 143-45, 173, 179. Alan Herron, a guard working in the security tower, called for additional assistance, and Officers Charles Bernard Sims, Brandon Slate, Bridget Hamilton-Law, and Kim Martoccia responded. Id. at 122, 144, 146. The officers eventually retrained Tuggle on the floor and, when he continued to struggle, they subdued him with pepper spray. Id. at 108, 122, 123, 146, 166.

Sergeant Boston was taken to the hospital as a result of his injuries. Id. at 142-45, 147; Ex. 10, 11, 12. He had two marks on his neck, one of which was bleeding, and pain and swelling on the left side of his face. Tr. p. 147. Additionally, Sergeant Boston had to

receive breathing treatments. Id. While Tuggle insisted at trial that Sergeant Boston initiated the encounter and injured Tuggle, there is overwhelming evidence in the record that, in fact, Tuggle initiated the encounter and injured Sergeant Boston. Even a witness who testified on Tuggle's behalf admitted that he saw Sergeant Boston headed to the hospital with an ice pack on his eye after the encounter with Tuggle. Id. at 216.

We find that such substantial evidence of Tuggle's guilt was introduced at trial that, even assuming for the sake of the argument that the trial court erred by allowing the State to briefly question Tuggle about his previous theft conviction, there is not a substantial likelihood that the evidence contributed to the jury's verdict. Because Tuggle cannot show that he was prejudiced, we do not find reversible error.

B. Motion to Dismiss

Tuggle argues that the trial court erred by denying his motion to dismiss his conviction for battery because he was not sentenced within thirty days of the conviction. Specifically, Tuggle argues that the five-month delay between the conviction and sentencing "offends the basic notion of fundamental fairness." Appellant's Br. p. 14.

Criminal Procedure Rule 11 provides that "[u]pon entering a conviction . . . the court shall sentence a defendant convicted in a criminal case within thirty (30) days of the plea or the finding or verdict of guilty, unless an extension for good cause is shown." Our Supreme Court has held that a trial court is excused from exact compliance with the thirty-day sentencing rule where there is good cause for the delay. McElroy v. State, 553 N.E.2d 835, 840 (Ind. 1990). Furthermore, good cause is presumed if the record is silent regarding the reason for the delay and the defendant made no objection. Id.

Tuggle was convicted of battery on November 22, 2006, but was not sentenced until June 13, 2007—a delay of more than six months. Although sentencing was initially scheduled for December 12, 2006, for reasons that are unclear from the record, a hearing did not occur on that date. Tuggle’s attorney filed a motion to withdraw as counsel on December 29, 2006. The trial court ordered new counsel appointed for Tuggle on January 9, 2007, and rescheduled the sentencing hearing for April 18, 2007. When that date arrived, the trial court rescheduled the hearing until May 9, 2007, because of a national judicial conference in which the judge was participating. On May 9, 2007, Tuggle requested a continuance, which the trial court granted, and the hearing was rescheduled for a final time.

Because there is no evidence regarding the reason the initially scheduled sentencing hearing was delayed and Tuggle did not object, we presume that good cause existed. McElroy, 553 N.E.2d at 840. And from December 29, 2006, until the date on which the sentencing hearing was finally held, the delays were because of a national judicial conference, Tuggle’s own request for a continuance, and the delay in acquiring new counsel for Tuggle. These reasons are not cause for concern. Furthermore, there is no evidence in the record that Tuggle objected to any of the delays until he filed his motion to dismiss on June 5, 2007—one week before the sentencing hearing was held. Because Tuggle did not object to the delays and the majority of the delays were at his request or for his benefit, we conclude that the trial court did not violate Rule 11 when it pronounced Tuggle’s sentence more than thirty days after his conviction.

II. FD-256 Probation Revocation

Tuggle does not contest that his battery conviction justifies the trial court's decision to revoke his probation. Instead, Tuggle emphasizes that he was imprisoned when he committed the battery offense and argues that he "was not yet on probation and the terms and conditions of probation were not in effect." Appellant's Br. p. 12.

The decision whether to revoke probation is a matter within the sound discretion of the trial court. Kelnhofer v. State, 857 N.E.2d 1022, 1023 (Ind. Ct. App. 2006). Indiana Code section 35-38-2-3(a)(1) provides that the trial court "may revoke a person's probation if [] the person has violated a condition of probation during the probationary period." We have consistently held that a "defendant's 'probationary period' begins immediately after sentencing, even if his or her actual probation begins at a later date." Kopkey v. State, 743 N.E.2d 331, 339 (Ind. Ct. App. 2001); Crump v. State, 740 N.E.2d 564, 567-68 (Ind. Ct. App. 2000); Gardner v. State, 678 N.E.2d 398, 401 (Ind. Ct. App. 1997). "Once a defendant has been sentenced, the court may revoke or modify probation, upon a proper showing of a violation, at any time before the completion of the probationary period." Gardner, 678 N.E.2d at 401; see also Johnson v. State, 606 N.E.2d 881 (Ind. Ct. App. 1993) (holding that the trial court did not abuse its discretion by prospectively revoking defendant's probation after defendant committed a crime while incarcerated).

Tuggle directs us to the trial court's original sentencing order in FD-256, which provided that he would be "placed on probation for a period of 2 years effective upon release." Appellant's App. p. 17. Tuggle cites principles of contract law and argues that

the “effective upon release” language is ambiguous and must be construed against the State. However, Tuggle’s argument fails because he does not acknowledge the difference between the terms “probation” and “probationary period.” In fact, we agree with Tuggle that he was not on probation at the time he committed the battery offense. However, because it is well established that he was in the probationary period when he committed the subsequent offense, we conclude that the trial court did not abuse its discretion when it revoked his probation.

The judgment of the trial court is affirmed.

RILEY, J., and ROBB, J., concur.